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NO. 86-5953

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAY D. SCOTT

Petitioner

vs.

STATE OF OHIO

Respondent

RECEIVED
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OFFICE OF THE CLERK,
SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

GEORGE J. SADD
Assistant Prosecuting Attorney
Attorneys for Respondent
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ROBERT M. INGERSOLL
Counsel for Petitioner
Assistant Public Defender
Cuyahoga County Public Defender
The Marion Building, Room 307
1276 West Third Street
Cleveland, Ohio 44113

COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Whether the Ohio Statutory Death Penalty scheme, which permits the jury to consider as an aggravating circumstance that the offender committed an aggravated murder while committing the crime of aggravated robbery violates the Eighth and Fourteenth Amendments of the United States Constitution.

2. Whether a jury instruction in a capital case violates the Eighth and Fourteenth Amendment of the United States Constitution when it orders the jury not to be influenced by any consideration of sympathy toward any party, and when no objection is offered to the instruction given.

3. Whether Petitioner's Due Process rights were violated by a trial court's instruction to the jury that a death verdict was only a recoumendation, and where no objection was offered to the instruction given, which did not diminish the jury's responsibility to impose a death sentence.

4. Whether a trial judge's comment which did not concern the petitioner's guilt or innocence but, rather, noted the fact that the news media had reported Petitioner's involvement with the crime violated due process of law.

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. Likewise, the Supreme Court of Ohio unanimously affirmed Petitioner's convictions.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

Petitioner appeals from his conviction and sentence for (a) Aggravated Murder while committing or attempting to commit Aggravated Robbery (Ohio Revised Code Section 2903.01(B)); (b) an aggravating circumstance that he committed the felony murder as the principal offender (Ohio Revised Code Section 2929.04(A)(4)); (c) Aggravated Robbery (Ohio Revised Code Section 2911.01); and (d) a penalty enhancing specification for committing the other offenses with a firearm (Ohio Revised Code Section 2941.141). Following their determination of his guilt, the jury decided that the aggravating circumstance for the felony murder outweighed any mitigating factors, and recommended the death penalty. The trial court independently evaluated the evidence, concurred in that recommendation, and ordered the petitioner's execution.

The Court of Appeals, Eighth Judicial District, after an independent review, required by Ohio law, unanimously upheld the convictions.

The Ohio Supreme Court, in State v. Scott, 26 Ohio St. 3d 92 (1986), unanimously affirmed Petitioner's convictions.

STATEMENT OF THE FACTS

The victim, an elderly woman, was killed by a single shot from a .38 caliber gun while she was operating her delicatessen near noon on May 6, 1983. The State called thirteen witnesses during the guilt phase of the trial: two alleged accomplices, a friend of the petitioner, and two of the alleged accomplices, three persons who were near the crime scene, two examiners from the coroner's office, and five police officers.

The first alleged accomplice, Danny Jones, testified that he drove his 1981 green and white Cadillac to the vicinity of the crime. The car had an expired 30-day temporary license in the rear window, but no license mounted on the rear bumper. The petitioner was a front seat passenger, while Edward O'Neal and Michael Streeter rode in the back. The four men had been drinking wine and beer as they rode around in the car that morning. The petitioner had a .38 caliber handgun, and one of the men passed around a .25 caliber chrome plated automatic. Jones said that they went to get some beer after leaving his

cousin's house. The first store they tried was closed, so they headed for the victim's delicatessen at Streeter's suggestion.

Jones said he parked the car approximately two blocks from the delicatessen, while the petitioner and O'Neal went to that store to get some beer and something to eat. Shortly thereafter, the petitioner and O'Neal returned to the car, running through a yard and jumping over a fence. The petitioner jumped head first through the open front window, and O'Neal returned to his seat in the back. Jones asked them, "What's wrong," and the petitioner replied, "Nothing." O'Neal was shaking his head. Jones drove off and went to his girfriend's house. When they arrived there, O'Neal said, "He shot the woman * * * he shot the old lady." Jones later asked the petitioner why he shot the woman in the store, and the petitioner told him, "She went for her shit," meaning that she reached for a weapon. Jones denied that the men had discussed robbery before they stopped near the delicatessen, despite his earlier statement to the police that Streeter had suggested it.

O'Neal testified that the four men had been riding in Jones' car when he asked to stop to get something to eat. The petitioner accompanied him into the delicatessen, where the woman operator was alone. Once inside, he realized that the delicatessen did not sell beer, so he ordered some bologna and crackers. She placed them on the counter to put them in a bag. O'Neal testified that the petitioner then drew his .38 caliber gun, pointed it at the woman, and told her, "Freeze." She cried out, and the petitioner shot her. O'Neal claimed that the petitioner grabbed him, and the two men ran back to the car. He denied that there had been any discussion about a robbery and said that nothing was taken from the store. The defendant later told him that he would not have shot the woman if she had not reached for a gun.

Ricky Tramble was a friend of three of the four men. On the afternoon and evening following the shooting, he was with them. The petitioner had a gun in his belt. Tramble heard the petitioner say, "Well, I did what I had to do. She shouldn't have made me move like that * * * Fuck it. It's over with." The petitioner later told him, "There niggers don't know what they're doing * * * and they get to crying about this and crying about that. This is what

I do." O'Neal subsequently recounted the events at the delicatessen. The defense sought to impeach Jones, O'Neal, and Tramble by showing their previous criminal records and the favorable plea bargains offered them to obtain their testimony.

Three people near the crime scene corroborated parts of the testimony by Jones and O'Neal. A woman saw a car which matched the general description of Jones' car move a short distance in front of her home. She lived at the place Jones said he parked while the other two men went to the delicatessen. There were only two occupants when she first saw it, the driver and a man in the back seat. Later, another man came running, jumped over a fence, and dove into the car's front window. The car then drove away.

A man who lived in the neighborhood of the delicatessen was approaching it when he heard a gunshot in the store. He heard the screen door slam, turned, and saw two men run from the store and through nearby yards. One of the men was carrying a gun. The witness called into the store, and heard the victim say, "Oh my God," twice. When he approached the store, he found the victim lying by the door "as if she were trying to chase them." He then flagged a nearby police car and told the officers that the suspects were still running down the street. A second witness from the neighborhood testified that he also saw two men run from the delicatessen, turn through an alley, and jump a fence.

A deputy coroner reviewed the autopsy protocol. She testified that the victim died from a gunshot and resulting internal injuries, with an entrance wound in the front of the chest and an exit wound in the left lower back. A trace evidence analyst from the coroner's office testified that her tests showed (a) the muzzle of the gun that fired the fatal shot was only twelve inches from the entry wound, and (b) the victim had not handled or fired a gun near the time of her death.

The first of the five police officers testified that he and his partner observed a man running down the street and shouting that someone had been shot. The man directed them to the delicatessen where they found the victim lying in the doorway with a gunshot wound. They called for an ambulance and assistance. A detective from the Scientific Investigation Unit discussed the

.38 caliber bullet which the police recovered from the delicatessen. It could not have been fired from the .25 caliber automatic which the police found on Jones when they arrested him. A second detective reported the call he received from Ricky Tramble and his later meeting with Tramble which caused him to locate Jones' Cadillac. He arrested Jones and recovered the .25 automatic.

A third detective described the crime scene as he found it shortly after the shooting. The cash register was open and dollar bills were on the floor. He identified various exhibits, including photographs of the scene that showed the cash register open and a dollar bill on the floor. The final police witness arrested the petitioner in Philadelphia, Pennsylvania, six months after the shooting. The petitioner told him that he had been in Pennsylvania the entire time and asked who had been using his name in connection with a shooting and robbery in Cleveland.

The defense relied on its cross-examination of the State's witnesses and called no additional witnesses for the guilt phase of the trial. After the jury found the defendant guilty, neither side called any witnesses for the penalty phase of the trial. The petitioner made a lengthy unsworn oral statement pursuant to Ohio Revised Code Section 2929.03(D)(1). In that statement, the only purported mitigating circumstance was his claim that he did not commit the offenses for which he had been convicted.

REASONS FOR DENYING THE WRIT

I. The Ohio Statutory Death Penalty Scheme which Permits the Jury to Consider as an Aggravating Circumstance that the Offender Committed an Aggravated Murder while Committing the Crime of Aggravated Robbery Does Not Violate the Eighth and Fourteenth Amendments of the United States Constitution.

Petitioner asserts that Ohio Revised Code Section 2929.03 and 2929.04 are unconstitutional for treating felony murders in a different manner than premeditated murders. According to Petitioner, a principal in a felony murder is treated more harshly than a defendant charged with a premeditated murder, since a felony murder constituted one of the eight aggravating circumstances under Ohio Revised Code Section 2929.04, while premeditation is

not set forth as an aggravating circumstance.

Stated otherwise, Petitioner argues that aggravating factors for felony murders simply duplicate an element of the offense while a murder by prior calculation and design requires proof of a separate aggravating circumstance in order to justify a death sentence. As such, Petitioner argues that a single act should not both convict and aggravate.

The proper rsponse to this so-called defect in the Ohio statute is found in State v. Jenkins, 15 Ohio St. 3d 164 (1984). The following passage from Jenkins is dispositive:

> Assuming, arguendo, that the elements set forth under R.C. 2929.04(A)(7) are identical to those set forth under R.C. 2903.01(B), we need only review the Texas statute at issue in Jurek to determine whether such a practice is constitutionally proscribed.
>
> The Texas statute under consideration in Jurek did not set forth a category of statutory aggravating circumstances which, if proven, would justify the imposition of the death penalty. Instead, the Texas system set forth five classes of murders the existence of any one of which would justify the imposition of a death sentence. The high court took notice of the fact that the five classes of murder set forth in the Texas statute encompassed the separate aggravating circumstances set forth in the Georgia and Florida statutes under consideration in Gregg and Proffitt.
>
> In sustaining the Texas statute, wherein the conduct which convicts also aggravates, the court stated:
>
> "* * * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option - even potentially - for a smaller class of murderers in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime." Jurek, supra, at 271.
>
> Applying Jurek to the arguments raised by appellant in the present case demonstrates that even if we were to construe the aggravated conduct of felony murder set forth within R.C. 2903.01(B) as functionally equivalent to the aggravating circumstance under R.C. 2929.04(A)(7), no constitutional infirmities would arise. On the contrary, any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option.

2. A Jury Instruction in a Capital Case Does Not Violate the Eighth and Fourteenth Amendments of the United States Constitution When it Orders the Jury Not to be Influenced by any Consideration of Sympathy Toward any Party, and When No Objection is Offered to the Instruction Given.

Petitioner next contends that the jury was improperly instructed during the sentencing phase as to considerations of mercy, compassion and sympathy.

At the conclusion of the penalty phase, the trial court instructed the jury:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

It is apparent that Petitioner did not object to this instruction at trial. Hence, pursuant to State v. Fanning, 1 Ohio St. 3d 19, 437 N.E. 2d 583 (1982), this error need not be considered absent plain error. In State v. Jenkins, supra, this court reviewed a similar jury instruction advising the jury to exclude bias, sympathy or prejudice from consideration during the penalty phase of the trial. The court stated at 192 that this instruction "* * * is necessary and entirely consistent with the view expressed by the United States Supreme Court in Barclay v. Florida (1983), 463 U.S. 939 at 1144, 103 S. Ct. 3418, that, '[t]he thrust of our decisions on capital punishment has been "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."* * *'" (Citations omitted.)

3. Petitioner's Due Process Rights Were not Violated by a Trial Court's Correct Instruction to the Jury that a Death Verdict was Only a Recommendation. Such an Instruction did not Diminish the Jury's Responsibility to Impose a Death Sentence, especially When No Objection was Offered to the Instruction.

The Ohio Supreme Court addressed this argument in State v. Scott, 26 Ohio St. 3d 92 (1986) by noting that the petitioner did not object to the instruction given by the trial judge:

> Appellant also attacks the trial court's sentencing instruction on the basis that it improperly diminished the jury's responsibility for imposition of the death penalty.
>
> Once again, it is apparent that appellant did not object to this instruction at trial. As a rsult, any error

involved with this instruction may be deemed waived. State v. Fanning, supra.

Nevertheless, appellant may still argue that this instruction constitutes plain error under Crim. R. 52(B). Under this court's holding in State v. Long (1978), 53 Ohio St. 2d 91 [7 O.O. 3d 178], a defective jury instruction is not plain error unless "the outcome of the trial clearly would have been otherwise" if the error had not occurred. Id. at 97. Further, pursuant to R.C. 2929.05(A) appellate review of a capital offense is to be carried out in the same manner as other criminal cases.

In support of this proposition, appellant relies primarily on the United States Supreme Court's recent decision in Caldwell v. Mississippi (1985), 472 U.S. ___, 86 L. Ed. 2d 231, where the court reviewed a prosecutor's comments urging the jury not to view itself as determining whether the defendant would die because any death sentence would be reviewed for correctness by the state supreme court. The court concluded that the prosecutor's comment warranted reversal in that it was inaccurate "* * * both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform.* * * Id. at 243-244).

However, the Caldwell decision concerned a prosecutor's misstatement of the law as opposed to a trial court's instruction to a jury. Such a situation was directly addressed by the United States Supreme Court in California v. Ramos (1983), 463 U.S. 992. Therein, the court reviewed a jury instruction advising the jury that the governor had the authority to commute a life sentence without the possibility of parole, so parole would be possible. In upholding this instruction, the Ramos court at 1012-1013 reasoned:

"* * *[T]he State is constitutionally entitled to permit juror consideration of the Governor's power to commute a life sentence. This information is relevant and factually accurate and was properly before the jury* * *

"* * *It does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation. Finally, its failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm. Therefore, we defer to the State's identification of the Governor's power to commute a life sentence as a substantive factor to be presented for the sentencing jury's consideration."

In the case sub judice, the trial judge instructed the jury in relevant part as follows:

"A jury recommendation to the Court that the death penalty be imposed is just that - a recommendation.

"* * *

"* * *[Y]ou will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court. Your recommendation to the Court shall be one of the following: That Jay Scott be sentenced to life imprisonment with p-role eligibility after 20 full years of imprisonment; or Jay Scott be sentenced to life imprisonment with parole eligibility after 30 full years of imprisonment.

"This particular recommendation which you make is binding upon the Court, and I, the Judge, must impose the specific life sentence which you recommend."

This instruction precisely sets forth the caiptal punishment sentencing procedure as codified in R.C. 2929.03(D)(2). In State v. Buell (1986), 22 Ohio St. 3d 124, 144, this court found that a jury instruction which presented an accurate description of the sentencing procedure embodied in R.C. 2929.03(D)(2) was not constitutionally infirm. Accordingly, this proposition of law is without merit.

4. A Trial Judge's Comment which Does Not Concern the Petitioner's Guilt or Innocence but, Rather, Noted the Fact that the News Media had Reported Petitioner's Involvement with the Crime, Does Not Violate Due Process of Law.

Petitioner contends that the trial judge wrongfully abused his discretion in refusing to declare a mistrial. This contention is premised upon the following comments made by the trial judge during voir dire:

[THE COURT]: Now ladies and gentlemen, I have given you about as much as the Court really knows about the case, and there has been some - I know, some publicity or notoriety about it at the time that it occurred. I only know that because I happened to see an article printed in the newspaper at the time. You know that the victim is Vinnie Price (sic) and it's the Court's understanding that she was a storekeeper, and that the allegations concerning the robbery apparently occurred at her store.

Mr. Gerstenslager, do you have an idea of the neighborhood in which the store - the address- of the store; I don't-

MR. GERSTENSLAGER: [Assistant Prosecutor] 84 (sic) and Quincy.

THE COURT: 84th (sic) and Quincy. Not only was Mr. Scott - at least from the newspaper reports that I think that I had read - was involved in this,

there were three other-

MR. EISNER: [Defense Counsel] Objection-

THE COURT: -individuals who- pardon?

MR. EISNER: Your Honor, I object.

THE COURT: Come to the sidebar.

Shortly after this statement was made, defense counsel moved the court for a mistrial on the basis that the court's mention of a report linking the petitioner to the crime for which he was charged irreparably tainted the prospective jurors. Counsel for the prosecution "reluctantly" joined the motion for mistrial. The court overruled the joint motion for mistrial, but administered a lengthy cautionary instruction to the prospective jurors stressing that their judgment must be based solely upon the evidence adduced at trial. The judge also cautioned the jurors against being unduly influenced by any remarks the court may have made.

Pursuant to Ohio Revised Code Section 2945.36(D), a trial judge may discharge a jury without prejudice to the prosecution by the consent of the prosecuting attorney and the defendant. However, this action is subject to the discretionary judgment of the trial judge. State v. Sallee (1966), 8 Ohio App. 2d 9 [37 O.O. 2d 5]; State v. Palmieri (App. 1938), 28 Ohio Law Abs. 398, appeal dismissed (1939), 135 Ohio St. 30 [13 O.O. 526]. In State v. Wade (1978), Ohio St. 2d 182 [7 O.O. 3d 362], this court set forth the following analytical criteria to determine whether a trial judge's remarks were prejudicial so as to require a mistrial:

> (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they were made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel. Id. at 188.

When analyzed under this test, the trial judge's comments do not appear to require the declaration of a mistrial. The judge's alleged prejudicial comment was made at a point when the court was examining prospective jurors regarding their exposure to pretrial publicity. The judge's comment did not

did not concern the petitioner's guilt or innocence, but, rather, noted the fact that the news media had reported Petitioner's involvement with the crime. Thus, the remark at issue, when analyzed in light of the circumstances under which it was made, did not cast an aspersion upon Petitioner's innocence.

Further, the lengthy instruction which the trial judge gave to the prospective jurors after issuing this comment was such as to minimize any prejudicial effect this comment may have had upon the jurors.

Therefore, the petitioner's argument is without merit.

CONCLUSION

In conclusion, the Respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court.

The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

By _____
GEORGE J. SADD
Assistant Prosecuting Attorney
Attorneys for Plaintiff-Respondent
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

SERVICE

A copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been mailed this 30 day of January, 1987, to Robert M. Ingersoll, Counsel for Petitioner, Assistant Public Defender, The Marion Building, Room 307, 1276 West Third Street, Cleveland, Ohio 44113.

_____
GEORGE J. SADD
Assistant Prosecuting Attorney

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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AFFIDAVIT OF FILING

I George J. Sadd, being first duly cautioned and sworn, deposes and say that I am a member of the bar of this Court and otherwise competent to execute this Affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the twentieth day of January, 1987, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned matter. Such mailing was made within the time permitted by this Court for such a filing.

GEORGE J. SADD
Assistant Prosecuting Attorney
The Justice Center
1230 Ontario Street
Cleveland, Ohio 44113
(216) 443-7730

SWORN to before me and subscribed in my presence, this 16th day of January, 1987.

NOTARY PUBLIC

SANDRA BLANKO
Notary Public, State of Ohio
Recorded in Cuyahoga County
My Comm. Expires 10-26-91

OHIO REVISED CODE SECTION 2945.36 - FOR WHAT CAUSE JURY MAY BE DISCHARGED

The trial court may discharge a jury without prejudice to the prosecution:

(A) For the sickness or corruption of a juror or other accident or calamity;

(B) Because there is no probability of such jurors agreeing;

(C) If it appears after the jury has been sworn that one of the jurors is a witness in the case;

(D) By the consent of the prosecuting attorney and the defendant;

The reason for such discharge shall be entered on the journal.

2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if he was not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after having the matter of age raised as that he have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it.

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(4) The youth of the offender.

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications.

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim.

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statements of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds, that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.